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NO. 89-514

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1989

TRINITY COALITION, INC., Petitioner
V.
COMMISSIONER, TEXAS DEPARTMENT OF
HUMAN SERVICES, ET AL., Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. WHETHER AN UNSUCCESSFUL BIDDER FOR A STATE OFFERED CONTRACT HAS A PROPERTY RIGHT WHICH IS CONSTITUTIONALLY PROTECTED BY DUE PROCESS OF LAW.

LIST OF PARTIES

Trinity Coalition	Petitioner
Ron Lindsay Commissioner Texas Department of Human Services	Respondent
James B. Harvey	Respondent
Manuel Aldas	Respondent
Fernando Chacon Eduardo N. Lerma	Counsel for Petitioner
James C. Todd, Chief General Litigation Division	Counsel for Respondents
Edwin N. Horne Assistant Attorney General	Counsel for Respondents

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TRINITY COALITION, INC., Petitioner
V.
COMMISSIONER, TEXAS DEPARTMENT OF HUMAN SERVICES, ET AL., Respondents

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the 41st District Court of El Paso County, Texas is unpublished. The opinion of the Texas Court of Appeals is published as *Commissioner, Texas Department of Human Services v. Trinity Coalition, Inc.*, 759 S.W. 2d 762 (Tex. App.--El Paso, 1988, writ dism'd w.o.j.

STATEMENT OF THE CASE

The instant appeal concerns the actions taken by the Respondents, officials of the Texas Department of Human Services (TDHS), during the competitive bidding process for a contract to provide day care services to low income families in the El Paso, Texas area.

Pursuant to authority conferred by the Texas Human Resources Code §22.002 (f) (Vernon, 1980), TDHS is authorized to enter into contracts with public or private agencies in order to accomplish the purposes of the department's programs. The

TDHS Contract Administration Handbook (CAH) sets forth the rules and regulations which govern contract procurement and administration. The CAH provisions are codified in 40 T.A.C. §69.000, et seq. *(Exhibit I, S.F. Vol. I), See Appendix A-2.*

In August of 1987, TDHS determined that it would solicit bids for the 1988 day care services contract. *(Statement of Facts, Vol. III, P. 14, lines 17-25).* TDHS has the authority to renew an existing contract or award a new contract through the competitive procurement process. *40 T.A.C. §69.204 (Statement of Facts, Vol. III, p. 17); See Appendix A-2.* In accordance with its rules and regulations regarding competitive bidding, TDHS published a request for bid proposals for the 1988 contract. TDHS notified the holder of the 1987 contract, Petitioner, that its contract would not automatically renew. Although agency regulations provide current contractors with an appeal following non-renewal, Petitioner did not request an appeal.

On October 5, 1987, Petitioner timely submitted a bid for the 1988 contract. Following a review of Petitioner's bid, TDHS determined that it was a non-responsive bid because it failed to meet all screenable criteria set forth in the bid packet. TDHS notified Petitioner in writing that its bid was deemed non-responsive due to the existence of an unresolved audit exception. An unresolved audit exception was defined in the bid packet as an "exception for which the contractor has exhausted all administrative and judicial remedies an also refuses to comply with written demands for payment from the department". *(Exhibit D-1, Statement of Facts Vol. III).* The bid was consequently precluded from further consideration. *(Transcript of Proceedings, p. 127);* 40 T.A.C. §69.227; See Appendix A-2. Petitioner attempted to appeal the rejection of the bid as non-responsive. The TDHS

hearing officer notified Petitioner than an appeal of the bid rejection was not available. *(Transcript of Proceedings pp. 177-178).*

Following the rejection of Petitioner's bid, the only bid submitted, TDHS negotiated with and awarded the 1988 contract to the YWCA pursuant to the authority conferred by 40 T.A.C. §69.209 (4); See Appendix A-2.

Petitioner filed suit in the 41st District Court of El Paso County, Texas, seeking declaratory and injunctive relief and damages based, in part, upon allegations that the denial of an appeal following the rejection of Trinity Coalition's bid violated Petitioner's due process rights.

The El Paso District Court entered a temporary injunction based upon findings that Respondents violated agency rules and regulations regarding contract procurement, acted arbitrarily and capriciously, and in violation of Petitioner's due process rights during the bidding process for the 1988 contract.

On appeal, the Texas Court of Appeals vacated the temporary injunction and remanded the case with instructions for dismissal on sovereign immunity grounds after finding that the Respondents' actions were in conformity with and authorized by agency policies and procedures regarding contract procurement. The Court of Appeals specifically held that "precontract negotiations, expectations, prospects, or pursuits are not the vested property rights, benefits or interests which are constitutionally protected by procedural due process". *Commissioner, Texas Department of Human Services v. Trinity Coalition, Inc.*, 759 S.W.2d 762, 764 (Tex. App.--El Paso, 1988). The Texas Supreme Court dismissed

Petitioner's Application for Writ of Error for want of jurisdiction, and subsequently overruled Petitioner's Motion for Rehearing.

ARGUMENT FOR DENIAL OF THE WRIT

Petitioner seeks review by this Court based upon allegations that Respondents violated Petitioner's due process rights in failing to permit Petitioner to appeal the classification of its bid as non-responsive. While Respondents agree with Petitioner's discussion of the legal requirements of the Due Process Clause of the Fourteenth Amendment, with respect to vested property rights, Respondents disagree with Petitioner's interpretation of the facts in support of its purported vested property right to the 1988 contract. Under Texas law, the Court of Appeals is the final arbitrator of the facts. *Tex. Gov. Code §22.001 (a) (6).*

The law regarding the existence of a property right giving rise to due process protection is clearly established. Consequently, Petitioner has failed to demonstrate that there are special and important reasons for the exercise of this Court's discretion as is set out in Rule 17 of the Supreme Court Rules. The requirements of due process apply only to deprivations of property and liberty protected by the Fourteenth Amendment. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 2705 (1972). The first inquiry then is the nature of the interest at stake. *Id. 92 S.Ct. at 2706.* Property interests are created by independent sources such as state law, rules and regulations. Persons asserting the improper denial of a property right must have more than a unilateral expectation in a benefit; there must be a mutually explicit understanding in support of the

property right asserted. *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 2699 (1972).

The flaw in Petitioner's argument lies in the fact that the submission of a contract bid does not give rise to a property interest. Petitioner repeatedly attempts to confuse the nature of its interest in the 1988 contract by characterizing the rejection of its bid for the 1988 contract as a non-renewal of the 1987 contract.

Petitioner seeks to manipulate the rights of appeal conferred by state law and agency regulation by mischaracterizing the circumstances surrounding the bidding procedure for the 1988 contract in an attempt to justify its claim of a property right in the 1988 contract. Petitioner incorrectly classifies the contract as a renewal and also claims a right to appeal as a current contractor. Based upon this erroneous characterization, Petitioner asserts that applicable state laws and TDHS regulations confer a property right entitling Petitioner to an appeal.

Although regulations at 40 T.A.C. §69.204 permit TDHS to renew an existing contract at TDHS' option, the T.A.C. specifically provides that "renewal of a contract is not automatic". *(Statement of Facts Vol. II, p. 17, lines 14-21); 40 T.A.C. §69.204 (c); See Appendix A-2.* With respect to the 1988 contract for day care services, TDHS made the decision to award a new contract through the competitive procurement process, rather than renew the existing 1987 contract. *(Statement of Facts Vol. III, P. 16, Lines 17-25).* Correctly stated, the 1988 contract was to be a new contract awarded to a qualified bidder through the competitive procurement process, rather than a renewal of the 1987 contract. Petitioner's bid was rejected. TDHS rules do not permit a hearing on the failure to get a bid. Petitioner continually

expounds on its "understandings" and "expectations" created by a misrepresentation of the relevant statutory and regulatory requirement. Such unilateral expectations do not, however, give rise to a property interest protected by due process. As indicated in correspondence between the parties, Petitioner's attempted appeal clearly arose from the rejection of its bid for the 1988 contract. See Appendix A-3-7. Under the relevant statutory and agency policy provisions, an appeal from the denial of a bid is clearly not available. *Tex. Rev. Civ. Stat. art. 6252-13e § 9 (i).*

Petitioner relies on language in the Proposal instructions which reads in relevant part...

> 'the current Contractor may appeal the nonrenewal or funding reduction under the auspices of Senate Bill 117...

Senate Bill 117 was codified as *Tex. Rev. Civ. Stat. art. 6252-13e.* As amended in 1985, appeal rights are not afforded to entities who become subject to the agency's competitive bidding process. Tex. Rev. Civ. Stat. art. 6252-13e §9(i) specifically provides that notice and hearing are not required if the denial of a contract is the result of the competitive procurement process. *(Statement of Facts Vol. I, p. 59, lines 6-17; See also, Statement of Facts Vol. I, Ex. p. 16-17); See also, Appendix A-5.* Petitioner does not dispute that it was engaged in the competitive procurement process. The "understanding" Petitioner claims exists with regard to its appeal rights is not supported by a clear reading of the applicable statutes and regulations. Petitioner professes to have an "understanding" that it was negotiating or had an interest in the contract, however, this unilateral "understanding" does not give rise to a property interest protected by due process. *Roth, 92 S.Ct. at 2709.* Petitioner's mischaracterization of the process or its misinterpretation of the bidding

instructions and statutes cannot create a property right protected by due process. Although Petitioner was interested in securing the 1988 contract, Petitioner had no legitimate claim of entitlement to the contract. Petitioner's interest and expectation in obtaining the contract was unilateral, and as such, was insufficient to establish a protected property right. *Roth, 92 S.Ct. at 2709.*

The bidding process confers no constitutionally protected property right requiring due process. Applicable state law and agency regulations specifically exempt competitive bidding from appeal. Petitioner had no constitutionally protected property right in its bid for the 1988 contract. Absent a property right, Petitioner was not entitled to any due process following the rejection of its contract bid.

CONCLUSION

For the reasons discussed above, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

LOU McCREARY
Executive Assistant Attorney General

JAMES C. TODD
Chief
General Litigation Div.
Texas Bar No. 20094700
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Austin, Texas 78711
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on opposing counsel on this the _____ day of November, 1989 by United States Mail, certified, return receipt requested, to:

Fernando Chacon
310 N. Mesa
Suite 325
El Paso, Texas 79901

Eduardo N. Lerma
Attorney at Law
1417 Montana Ave.
El Paso, Texas 79902

JAMES C. TODD
Chief
General Litigation Div.

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TEXAS ADMINISTRATIVE CODE

TITLE 40
SOCIAL SERVICES AND ASSISTANCE

§69.204. **Duration and Renewal of Contracts**

(c) Renewal of a contract is not automatic; the contract may be renewed at the department's option, when authorized, and when it is in the department's best interests.

§69.209. **Noncompetitive Negotiation**

(a) staff may use noncompetitive negotiation if one of the following is applicable.

(4) No acceptable bids using a competitive procurement method are received.

§69.227. **Screening**

(a) An offeror must meet all screeming requirements in the solicitation; otherwise, the offer is eliminated from further consideration

§69.269. **Contract Termination**

Terminations of contracts occur when the term of the contract expires, both parties mutually agree to end the contract, and/or when either party terminates a contract because of unreconcilable differences.

Texas Department of Human Services
1200 Golden Key Circle, 4th Floor
P.O. Box 10276
El Paso, Texas 79994

Contract Services
Mail Code 111-1
(915) 595-1700

COMMISSIONER

MARLIN W. JOHNSTON

November 6, 1987

Mr. Jose Rivera, Chairperson
Trinity Coalition
3125 Rivera Avenue
El Paso, Texas 79905

Re: Award Notification for Day Home Services, Region 03, Texas Department of Human Services, El Paso County, Texas, Request for Proposal 03 D 88 Effective January 1, 1988

Dear Mr. Rivera:

In accord with the policies and procedures of the above referenced Request for Proposal (RFP), Region 023 of the Texas Department of Human Services announces its determination that the proposal submitted by Trinity Coalition has been found to be non-responsive.

This determination is based on the RFP Committee's consensual finding that Trinity's proposal failed to meet Item #5 of the assurances which states:

> *"It owes no funds to the Department for unresolved audit exceptions. An unresolved audit exception is an exception for which the contractor has exhausted all administrative and judicial remedies and*

also refuses to comply with resulting written demands for payment from the Department."

The Department appreciates the interest and energy invested by you in your application.

All unsuccessful offerors responding to an RFP are entitled to request a debriefing relating to the general strengths and weaknesses of the proposals. If you wish to request a debriefing, I must receive a written request within ten (10) days of the receipt of this letter.

Sincerely,

Melinda Read
Contract Manager

TRINITY COALITION
3125 RIVERA AVENUE
EL PASO, TEXAS 79905 (915) 533-5991

November 16, 1987

Honorable Judge
Ms. Susan Nash Fekety
Administrative Law Judge
Texas Department of Human Services
John H. Winters Center
701 W. 51st Street
Austin, Texas 78769

Dear Honorable Judge Fekety:

On November 6, 1987, Trinity Coalition received an Award Notification Letter in reference to RFP #03 D 88 denying Trinity Coalition a contract for 1988. (please see attached letter)

Trinity Coalition is appealing in accordance with RFP 03 D 88, Proposal Submission Instructions, page 8,

> *". . .the current Contractor may appeal the nonrenewal or funding reduction under the auspices of Senate Bill 117, which took effect on September 1, 1983. The Department will notify the current contractor of its appeal rights in writing."*

Thank you for your attention.

Sincerely,

for
Jose Rivera
Chairperson, Board of Director

Texas Department of Human Services
John W. Winters Human Services Center
701 West 51st Street
P.O. Box 2960, Austin, Texas 78769

COMMISSIONER

MARLIN W. JOHNSTON

CERTIFIED MAIL,RETURN RECEIPT REQUESTED

November 19, 1987

Mr. Jose Rivera, Chairperson
Trinity Coalition
3125 Rivera Avenue
El Paso, Texas 79905

Dear Mr. Rivera:

This is in response to your November 16, 1987 letter requesting a hearing of the Department's decision not to award Trinity Coalition a contract. I have been informed that Trinity Coalition's bid for a contract in response to a Department request for proposal (RFP), and that your organization was determined by the Department to be non-responsive to the RFP. For that reason, no contract was offered to your organization.

The S.B. 117 which was referenced in the RFP is Tex. Rev. Civ. Stat. art. 6252-13e. When this statute was enacted in 1983, it gave fairly broad rights of appeal to block grant contractors whose funding was reduced or terminated. However, in 1985 the Legislature amended Section 9 of the act to provide that the appeal rights were not available ". . .if an entity's block grant funding becomes subject to the agency's competitive evaluation." The Department's rules allowing contractors to appeal

likewise indicate that no appeal is available in a competitive procurement setting.

The Department's procurement rules require competitive bidding for substantially all of its contracted services, including those upon which Trinity Coalition bid. Consequently, no hearing is available under art. 6252-13e or the Department's rules to allow your organization to contest the refusal of the Department to award a contract following competitive bids.

Sincerely,

Susan Nash Fekety
Administrative Law Judge

bsm